Supreme Court, U.S
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No. 02-1379

In the
Supreme Court of the United States

THE CITY OF BURBANK,
Petitioner,

v.

IRV RUBIN AND ROBERTO ALEJANDRO GANDARA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND DISTRICT, DIVISION TWO

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

ADDITIONAL QUESTION PRESENTED

In addition to the three questions presented by Petitioner, Respondents submit that this case also presents this Court with the opportunity to overrule Marsh v. Chambers, 463 U.S. 783 (1983), which upheld on a six to three vote prayers at legislative sessions. Although this Court need not overrule Marsh v. Chambers, supra, in order to affirm the judgment below this Court could utilize this case for the purpose of revisiting and overruling Marsh v. Chambers. Respondents advised the trial court, the California Court of Appeal, and the California Supreme Court that Marsh v. Chambers was wrongfully decided by this Court and should this case ever reach this Court Respondents would ask this Court to overrule Marsh v. Chambers. Respondent did concede that the trial court, the State Court of Appeal, and the State Supreme Court were all bound by Marsh v. Chambers and also contended that even if Marsh v. Chambers was valid the prayer in this case nevertheless violated the Establishment Clause of the First Amendment.

This issue is implicit in the overall questions presented in the certiorari petition and may be reached by this Court although it is not essential that this Court decide it. See Rule 14.1(a) and Vance v. Terrazas, 444 U.S. 252, 258-259, n.5, 100 S.Ct. 540, 544-545 n.5 (1980).

PARTIES TO THE PROCEEDINGS

The Petitioner is the City of Burbank, a municipal corporation organized and existing under the laws of the State of California.

The Respondents are Irv Rubin and Roberto Alejandro Gandara, both individuals. Irv Rubin recently died and his widow, Shelley Rubin, is willing to become a party to this proceeding by order of this Court or by order of the California courts. Whether or not officially made a party to these proceedings Shelley Rubin has standing under California law to enforce the permanent injunction issued in favor of her late husband and also issued in favor of Respondent Roberto Alejandro Gandara, who is very much alive and well.

TABLE OF CONTENTS

Page

Questions Presented i

Additional Question Presented i

Parties to the Proceedings ii

Table of Contents iii

Table of Authorities iv

Response to Petition for Writ of Certiorari 1

TABLE OF AUTHORITIES

FEDERAL CASES

Bacus v. Palo Verde Unified School District,
11 F.Supp.2d 1192 (C.D. Cal 1998
reversed, 52 Fed. Appx. 355 (9th Cir. 2002) . . . 4

Bogen v. Doty, 598 F.2d 1110 (8th Cir.1979) 4

Chambers v. Marsh,
504 F. Supp. 585 (D.C. Neb. 1980) 5

Chambers v. Marsh, 675 F.2d 228 (8th Cir. 1982) 5

Cole v. Oroville Union High School District,
228 F.3d 1092 (9th Cir. 2000) 3

County of Allegheny v. ACLU,
492 U.S. 573, 106 L. Ed. 2d 472,
109 S. Ct. 3086 (1989) 5-7, 9

Good News Club v. Milford Central School,
533 U.S. 98, 121 S. Ct. 2093,
150 L. Ed. 2d 151 (2001) 3

Lee v. Weisman,
505 U.S. 577, 120 L. Ed. 2d 467,
112 S. Ct. 2649 (1992) 1

Marsh v. Chambers,
463 U.S. 783, 77 L. Ed. 2 1019,
103 S. Ct. 3330 (1983) . . . . . i, 5-7, 9, 11

Newdow v. United States Congress,
313 F.3d 495 (9th Cir. 2002) 11

Santa Fe Independent School District v. Doe,
530 U.S. 290, 147 L. Ed. 2d 295,
120 S. Ct. 2266 (2000) 2, 3

Snyder v. Murray City Corp.,
159 F.3d 1227 (10th Cir. 1998) (en banc) 4

Stein v. Plainwell Community Schools,
822 F.2d 1406 (6th Cir. 1987) 1

Vance v. Terrazas,
444 U.S. 252, 100 S. Ct. 540 (1980) i

Washegesic v. Bloomingdale Public School,
33 F.3d 679 (6th Cir. 1994) 10

STATE CASES

Lincoln v. Page,
109 N. H. 30, 241 A.2d 799 (1968) 4

Marsa v. Wernik,
86 N.J. 232, 430 A.2d 888 (1981) 4

Society of Separationists, Inc. v. Whitehead,
870 P.Rptr 2d 916 (Utah Supreme Court 1993) . 4

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

The second and third questions presented by the Petition are not worthy of this Court's review.

With respect to the second question, of necessity the judicial branch must enforce the Establishment Clause of the First Amendment. Courts must be free to issue injunctions to make sure that the Establishment Clause is obeyed. There are numerous examples of injunctions enforcing the Establishment Clause.

In Lee v. Weisman, 505 U.S. 577, 120 L.Ed.2d 467, 112 S.Ct. 2649 (1992) a public school student and her father brought a lawsuit in the federal court seeking a permanent injunction to prevent the inclusion of invocations and benedictions in the form of prayer at graduation ceremonies at city public schools. The lawsuit was prompted by the delivery of a prayer by Rabbi Leslie Gutterman. The Rabbi's prayer is set forth in the opinion of this Court. The federal district court granted relief holding that the invocations and benedictions violated the Establishment Clause of the First Amendment. The district court issued a permanent injunction which prohibited school officials from allowing the practice to continue. The United States Court of Appeals for the First Circuit affirmed and this Court affirmed.

In Stein v. Plainwell Community Schools, 822 F.2d 1406 (6th Cir. 1987), the Sixth Circuit reversed the judgment of the district court and ordered it to issue an appropriate injunction to prohibit invocations and benedictions that ". . . employ the language of Christian theology and prayer. . . ." Id. at 1410.

If Petitioner is contending that it, as a city government, cannot become entangled with religion otherwise it would violate the Establishment Clause, such a contention is invalid. Legislative bodies, school boards, and principals must from time-to-time decide whether or not a particular speech is religious in nature and whether or not it violates the Establishment Clause.

In Santa Fe Independent School District v. Doe, 530 U.S. 290, 147 L.Ed.2d 295, 120 S.Ct. 2266 (2000), this Court held unconstitutional a prayer recited by a student at a high school football game in Texas. As a result of this Court's decision, Texas schools will have to determine whether or not particular recitations constitute prayers. Since the Establishment Clause is binding on all branches of government at both the federal and local levels, of necessity governmental institutions must determine whether or not a particular message is a prayer or not. The determination as to whether a particular statement constitutes a prayer does not entangle the government in the process of making that determination. Moreover, even assuming prayers are acceptable so long as they are non sectarian, some governmental entity must make that decision. Again, the determination as to whether a particular prayer is valid or not or whether something constitutes a prayer at all does not entangle the government in religion to such an extent that the Establishment Clause is violated. It cannot be that the enforcement of the Establishment Clause is itself a violation of the Establishment Clause. In a nut shell that is the argument of Petitioner and it is simply not the law.

The third question posed by Petitioner is likewise unworthy of this Court's review. In particular, Petitioner states that the determination by a legislative body as to whether a particular prayer is sectarian or non sectarian does

not constitute view point discrimination. The very case cited by Petitioner in question number three does not support Petitioner. This Court stated in Good News Club v. Milford Central School, 533 U.S. 98, 114, 121 S.Ct. 2093, 2103, 150 L.Ed.2d 151 (2001),

> "We have said that a state interest in avoiding an Establishment Clause violation 'may be characterized as compelling,' and therefore may justify content - based discrimination. . . . However, it is not clear whether a State's interest in avoiding an Establishment Clause violation would justify view point discrimination. . . ."

This Court went on to conclude in Good News Club v. Milford Central School, supra, that the Establishment Clause issue need not be decided because the school had no valid Establishment Clause interest.

Here the issue of discrimination is not present because the prayer in this case before the Burbank City Council was part of the City Council program. This case does not involve some private citizen walking into a City Council meeting off the street and attempting to address the City Council. Here the invocation was part of the program. If the Mayor of the City of Burbank could not recite the prayer at issue here neither could he or she delegate the task of reciting the prayer to someone who is part of the program and who is listed on the agenda. This case involves government speech, not private speech. The free speech provision of the First Amendment does not protect government speech but only private speech. See Santa Fe Independent School District v. Doe, supra, and Cole v. Oroville Union High School District, 228 F.3d 1092 (9th Cir. 2000).

This leads us to the first question presented. It could have been phrased a little more neutrally because it makes reference to a "prayer offered by citizen volunteers at a public meeting of a legislative body . . . ." The so called "citizen volunteer" in this case happened to be a minister officially designated by the City Council to be the one to provide the invocation. His name was on the agenda and the prayer was offered as part of the meeting. If this Court should grant certiorari it will have the entire City Council tape, including the first portion with the prayer, to review.

In any event, Respondents concede that the first question presented might be worthy of review because the uncertainty as to whether sectarian prayer is permissible was created by two decisions of this Court. Also, this Court may wish to distinguish local city council meetings from state or federal legislative meetings, although Respondents concede that city council prayers have been upheld by lower courts: Society of Separationists, Inc. v. Whitehead, 870 P.2d 916 (Utah Supreme Court 1993), Marsa v. Wernik, 86 N.J. 232; 430 A2d 888 (New Jersey Supreme Court 1981), Lincoln v. Page, 109 N.H. 30; 241 A2d 799 (New Hampshire Supreme Court 1968). See also Bogen v. Doty, 598 F.2d 1110 (8th Cir.1979) and Snyder v. Murray City Corp., 159 F.3d 1227 (10th Cir. 1998) (en banc).

The United States District Court for the Central District of California came to the opposite conclusion regarding prayers invoking the name "Jesus Christ" in Bacus v. Palo Verde Unified School District, 11 F.Supp.2d 1192 (C.D. Cal. 1998). The District Court's published decision was reversed by the Ninth Circuit in an unpublished memorandum on December 3, 2002 (Bacus v. Palo Verde Unified School District, 52 Fed. Appx. 355. (9th Cir. 2002).

The California Court of Appeal below correctly followed this Court's precedents - Marsh v. Chambers, 463 U.S. 783, 77 L.Ed. 2d 1019, 103 S.Ct. 3330 (1983) and County of Allegheny v. ACLU, 492 U.S. 573, 106 L.Ed.2d 472, 109 S.Ct. 3086 (1989). Marsh v. Chambers, supra, involved the retention by the Nebraska legislature of a Presbyterian minister, Robert E. Palmer, to serve as a Chaplin at a monthly salary for each month the Nebraska legislature was in session. This Court noted in its opinion, footnote 14, that Palmer's earlier prayers were often explicitly Christian . . . ."

According to the District Court's opinion, Chambers v. Marsh, 504 F.Supp. 585 (D.C. Neb. 1980), the Eighth Circuit's decision, Chambers v. Marsh, 675 F.2d 228 (8th Cir. 1982), and this Court's decision, Marsh v. Chambers, supra, Senator Chambers, a duly elected member of the Nebraska legislature, found some of the prayers so offensive to his values that he excused himself on occasions during the prayers. A non Christian, Senator Chambers filed the lawsuit in the federal district court in Nebraska complaining about the compensation of Palmer and his offering of daily prayers. Apparently Palmer removed all references to Jesus Christ in response to the complaint filed by Senator Chambers. The U.S. District Court found the prayers were permissible but that the Chaplin should not have been compensated by the state. The Sixth Circuit affirmed in part and reversed in part. The Sixth Circuit held that the entire legislative prayer practice was unconstitutional. In granting certiorari, this Court stated that it was limiting the question presented to "whether the Nebraska legislature's practice of opening each legislative day with a prayer by a Chaplin paid by the state violates the Establishment Clause of the First Amendment."

It should be noted that this Court did not grant certiorari to determine whether the particular prayer itself was proper. After granting certiorari to resolve only one question of the four questions presented, six Justices of this Court held that the practice of opening legislative sessions with prayer had become part of the fabric of American society and did not violate the Establishment Clause. Three Justices dissented.

As stated earlier, Respondents did contend both in the trial court, the State Court of Appeal, and the State Supreme Court that this Court wrongfully decided Marsh v. Chambers. However, Respondents did concede that so long as Marsh v. Chambers is the law the lower courts were obligated to follow it. Respondents argued below that the injunction granted by the trial court did not violate Marsh v. Chambers but rather was consistent with it.

This Court made it clear in County of Allegheny v. ACLU, 492 U.S. 573, 106 L.Ed.2d 472, 109 S.Ct. 3086 (1989), that what saved the prayer in Marsh v. Chambers was the removal of Jesus Christ from the prayer.

In the County of Allegheny case this Court addressed the constitutionality of the placement of a creche at the County Courthouse and the placement of the Chanukah Menorah outside a city and county building. This Court held that the display of the creche violated the Establishment Clause but that the display of the Menorah next to the Christmas tree did not. No challenge had been made to the Christmas tree itself. Justice Blackmun wrote the opinion for the court and while his entire opinion did not command the majority of the Justices part V of his opinion did.

Specifically, in Part V A in the opinion for the Court, Justice Blackmun stated,

> ". . . However history may affect the constitutionality of nonsectarian references to religion by the government, history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed." 492 U.S. at 603, 109 S.Ct. at 3106.

Blackman then referred specifically to Marsh v. Chambers, supra:

> "Indeed, in Marsh itself, the Court recognized that not even the 'unique history' of legislative prayer, 463 U.S., at 791, 103 S.Ct., at 3336, can justify contemporary legislative prayers that have the effect of affiliating the government with anyone specific faith or belief. Id., at 794-795, 103 S.Ct., at 3337-3338. The legislative prayers involved in Marsh did not violate this principle because the particular chaplain had "removed all references to Christ." Id., at 793, n. 14, 103 S.Ct., at 337, n. 14...."

The portion of the opinion in County of Allegheny v. ACLU, supra, quoted above can be found at 492 U.S. at 603, 109 S.Ct. at 3106. As stated, four other justices joined this portion of Justice Blackmun's opinion for the Court.

The five justice majority, speaking through Justice Blackmun, reiterated this point (the government may not sponsor sectarian religious practices) in footnote 55 when the Court rejected Justice Kennedy's dissenting opinion and stated

that the historical justification for non sectarian legislative prayers could not be used support ". . . references to exclusively Christian creeds (like the Trinity or the Divinity of Jesus) in official acts or proclamations. . . ."

One of the justices who agreed with Part V A of Justice Blackmun's opinion for the Court was Justice O'Connor, who also wrote a separate concurring opinion. In Part II of Justice O'Connor's concurring opinion, Justice O'Connor stated,

> "An Establishment Clause standard that prohibits only 'coercive' practices or overt efforts at government proselytization, post, 492 U.S. at 659-662, 109 S.Ct. at 3136-3137, 492 U.S. at 663-665, 109 S.Ct. at 3138-3139, but fails to take account of the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others, would not, in my view, adequately protect the religious liberty with respect to religious diversity of the members of our pluralistic political community. Thus, this Court has never relied on coercion alone as the touchstone of Establishment Clause analysis. . . To require a showing of coercion, even indirect coercion, as an essential element of Establishment Clause violation would make the Free Exercise Clause a redundancy...." 492 U.S. at 627-628, 109 S.Ct. at 3119.

Justice O'Connor also stated in her concurring opinion, 492 U.S. at 629, 109 S.Ct. at 3120:

> ". . . [I]t is notable that the three Courts of Appeals which have considered challenges to the display of a creche standing alone at city hall have each concluded, relying in part on endorsement analysis, that such a practice sends a message to nonadherents of Christianity that they are outsiders in the political community. . . ."

It is clear that the decision of the California Court of Appeal below correctly stated the law as announced by this Court in Marsh v. Chambers, and County of Allegheny v. ACLU, supra. Since the filing of this lawsuit in November of 1999 world events have proven the wisdom of Respondents' lawsuit. It is clear that one of the most destructive activities of the population of this planet is the combining of religion with government. More and more the wisdom of the framers of the Constitution has proven remarkable. Countries do not succeed where religion and government are mixed. The separation of religion from government is critical. This is especially true in a pluralistic society such as the United States of America. The recitation of a prayer in the name of Jesus Christ is simply impermissible under the Establishment Clause of the First Amendment. Jesus Christ is central to the Christian religion. The Gospel according to St. John (Chapter 3):

> " 3. Jesus . . . said unto him, verily, verily, I say unto thee, Except a man be born again, he cannot see the kingdom of God. . . .
> 15. That whosoever believeth in Him should not perish, but have eternal life.
> 16. For God so loved the world, he gave his only begotten Son, that whosoever believeth in

> Him should not perish, but have everlasting life.
> 17. For God sent not his Son into the world to condemn the world; but that the world through Him might be saved.
> 18. He that believeth on Him is not condemned: but he that believeth not is condemned already, because he hath not believed in the name of the only begotten Son of God. . . .
> 36. He that believeth on the Son has everlasting life: and that he that believeth not the Son shall not see life; but the wrath of God abideth on him."

Jesus Christ is the Son of God according to the Christian religion. This is the central attribute of Christianity. By definition Christians view Jesus Christ as the Lord and Savior. Jesus of Nazareth was born a Jew but the Jewish religion does not consider Jesus to be the Son of God. Jews do not view Jesus as being the Savior.

In Washegesic v. Bloomingdale Public School, 33 F.3d 679 (6th Cir. 1994), the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court that a portrait of Jesus Christ be removed from a school where it was on display. In upholding the removal of the photograph, the Sixth Circuit stated, 33 F.3d at 648:

> ". . . Christ is central only to Christianity, and his portrait has a proselytizing, affirming effect that some non-believers find deeply offensive. Though the portrait, like school prayers and other sectarian religious rituals and symbols, may seem 'de minimis' to the

> great majority, particularly those raised in the Christian faith and those who do not care about religion, a few see it as a governmental statement favoring one religious group and downplaying others. It is the rights of these few that the Establishment Clause protects in this case."

In summary, the decision of the Court of Appeal below is the correct statement of the law. If this Honorable Court believes that the decision below is inconsistent with Marsh v. Chambers then this Honorable Court should grant certiorari and overrule Marsh v. Chambers. Otherwise, this Court should deny certiorari.[1]

Respectfully submitted,

ROGER JON DIAMOND
Attorney for Respondents

[1] Respondents are, of course, cognizant of the current interest in religion by the Courts. For example, in Newdow v. United States Congress, 313 F.3d 495 (9th Cir. 2002), the Ninth Circuit in a split decision held that the words "under God" would have to come out of the Pledge of Allegiance with respect to school children. On February 28, 2003 en banc review was denied but the decision was stayed pending review by this Court.